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No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1951

JAMES RUTKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 991-1008) is reported at 189 F. 2d 431.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1951 (R. 1009). Petition for rehearing was denied on June 19, 1951 (R. 1017). The petition for a writ of certiorari was filed on July 18, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, moneys which petitioner claimed and was able to persuade another to pay him by means of harassing demands and repeated threats, constituted taxable income.

2. Whether it was prejudicial error for the trial court to refuse to charge, in the language proposed by petitioner, that even if petitioner obtained money through threats, he must be acquitted if the money was, in fact, in payment for petitioner's interest in a business.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

The petitioner was indicted for wilfully attempting to defeat and evade a large part of his income and victory tax for the calendar year 1943. The charge was that he did so by filing a false and fraudulent return wherein he stated his net income for that calendar year was the sum of $18,966.64 and that the amount of income and victory tax owing thereon was the sum of $6,843.93, whereas his corrected net income was the sum of $268,622.04, upon which he owed an income and victory tax of $222,408.32. (R. 5-6.) On the basis of the jury's verdict of guilty (R. 3), the petitioner was fined $10,000 and was sentenced to imprisonment for four years (R. 3). The judgment of conviction was affirmed by the Court of Appeals for the Third Circuit, with one judge dissenting (R. 1009).

The sum of $250,000 involved in this case and charged by the Government to be the income of the petitioner in 1943, upon which no tax was paid, was admittedly transmitted by Reinfeld, the chief Government witness, to the petitioner. The Government charged that the payment was made as a result of extortion. The petitioner contended that it was in final settlement of his asserted interest in the Browne-Vintners Company, a corporation organized after the repeal of prohibition. It was conceded that if petitioner's version were the correct one, he would be entitled to an acquittal because the capital gains tax had already been paid on moneys

transferred in payment for interests in the Browne-Vintners Company. (R. 24; 991-992.)

The following is an outline of the evidence favorable to the Government which the jury was entitled to believe:—

The history, organization, and liquidation of the Browne-Vintners Company.—The witness, Reinfeld, testified that in 1926, during the prohibition period, he and five other men were engaged in what he called a "High seas venture". This was a bootlegging operation which, as described, consisted in putting "a boat out there beyond the 12-mile limit and different people come and buy whiskey." The enterprise continued until 1932. In 1929, the petitioner came into the group. According to Reinfeld the petitioner did not contribute any money, but "just wanted to be a partner and we took him in." Reinfeld explained that the petitioner was taken in without any monetary contribution because otherwise "we were afraid that we will get some interference and trouble." (R. 12-18.)

Reinfeld testified that the petitioner was to receive three percent of the profits. A few months after the inception of the "High Seas venture," one of the members of the organization "said he was going to quit because he had some arguments with Rutkin and he is afraid." (R. 18.) The person did quit and gave his three percent share to the petitioner (R. 18-19).

The "High Seas venture" was liquidated early

in 1933. There was an accounting "as to what each partner had". Each member was informed of his interest. The petitioner's percentage interest at that time was six percent, despite the fact that he had not paid any money into the enterprise. The petitioner was not entitled to any distribution upon the liquidation of the "High Seas venture" because he was then overdrawn to the extent of $35,000, and this fact was brought to his attention. He was given a memorandum showing that he was overdrawn to the extent of $35,000. (R. 22-24, 196, 992.)

In October, 1933, the members of the original "High Seas venture", with the exception of the petitioner, organized the Browne Vintners Company (R. 24). The petitioner did not own any of the Browne Vintners stock in his own name or through nominees. He did not have any interest in any of the assets of the corporation. (R. 24-26, 120.)

Reinfeld testified that in 1936, the petitioner, asserting that he had a six percent interest in the old company and a continuing six percent interest in Browne Vinters, demanded $60,000. Reinfeld's reply was: "Jim, you haven't got any money". Nevertheless, Reinfeld gave the petitioner the $60,000 because he liked him and because the petitioner had convinced him that "he is going to be a success". At that time the petitioner signed a document which, among other things, stated that

he sold, assigned and transferred to Reinfeld all of his "right, title and interest in and to six percent of the issued and outstanding shares of capital stock, preferred and common, as of October 1, 1936, of Browne Vinters Co., Inc., a New York corporation, which represents any and all of such shares of capital stock in the said Brown Vintners Co. Inc., that I am entitled to." As to this document, Reinfeld testified that the petitioner delivered it to him saying that "he was paid out in full according to what claims he was making and I decided to recognize the claims and pay him out in full." (R. 32-33, 289, 290-291.)

At the time the aforementioned document was executed, Browne Vintners was worth approximately $700,000, six percent of which would be approximately $42,000. The amount of $60,000 which Reinfeld gave the petitioner was more than the six percent which the petitioner claimed as his interest in the corporation. (R. 289.)

In 1939, Reinfeld obtained a job for the petitioner with Browne Vintners at $15,000 a year. The petitioner remained in this job from six to eight months. During that period the petitioner became involved in a liquor violation in Boston and asked Reinfeld to lend him $2,500. Reinfeld paid a lawyer named Kessler $2,500 to help him or for helping him. The petitioner lost his job because of the Boston incident. (R. 36-37, 993.)

Reinfeld and the petitioner had no discussions

about Browne Vintners except that occasionally the petitioner asked Reinfeld how business was. The petitioner came to the Browne Vintners offices three or four times during some months and sometimes not for six months. (R. 108.) The petitioner testified that he did not have an office in Browne Vintners but that he used all of the offices indiscriminately (R. 807). He stated that he was not an officer of the corporation, did not attend any of the stockholders or directors meetings, gave no orders to any of the officers of the company, and they took no orders from him. He did not know whether his name appeared on the records of the company as a stockholder. (R. 808.)

Joseph Newman, who was connected with Browne Vintners from 1933 to December, 1940, and who was its president for two years, testified that he saw the petitioner at the plant only a couple of times; that the petitioner did not have an office; did not represent the company in any of its affairs and did not attend stockholders or directors meetings and did not establish any policies or programs (R. 898-900). Edward T. Browne, first president of the company, testified that he did not know the petitioner and that he never saw him at the Browne Vintners premises during the time that he was president; that the petitioner did not participate in the business affairs of the company (R. 903). John H. Owen, former president and vice-president of Browne Vintners, later an

official with McKesson & Robbins, stated that he saw the petitioner at the Browne Vintners offices four or five times; that the petitioner had nothing to do with the business affairs, never participated in policy formation, never did any work at the New York office, and never attended any of the meetings of the stockholders or directors (R. 908-909). Mortimer Lowell testified that he did advertising work for Browne Vintners from its inception to the time that it was sold to Seagrams; that he was at the office frequently and never less than once a week and sometimes three or four times a week; that he saw the petitioner there several times and heard his name mentioned, but that the petitioner never gave any orders with respect to advertising and did not participate in any way (R. 907).

In 1940, after extensive negotiations, Browne Vintners was sold to Seagrams for $7,500,000. Debts amounting to $8,000,000 were assumed by the purchaser. (R. 27.) Except for certain monies withheld for debts and contingencies (R. 128), there was a distribution of the proceeds of the sale. The petitioner did not have any interest in the company at that time. He was not an actual or beneficial owner of any stock. (R. 28.) The sale of the company was not discussed with him. (R. 131.) A list of real stockholders and nominees was compiled by the accountants. (R. 28.) The capital gains tax on all the stock was paid by the record owners. (R. 129.)

The threats.—In 1941, Reinfeld gave the petitioner $10,000 on the latter's representations that he wished to purchase a tavern. The petitioner returned in a week or ten days for more money, at which time Reinfeld accused him of losing the $10,000 at the racetrack. "And that was our first trouble", Reinfeld stated. There was an argument and Reinfeld told the petitioner that he was not going to give him another cent; that he was finished. (R. 38-39.)

Reinfeld testified that in late October or early November, 1942, the petitioner came to his office at Browne Vintners and started off by saying to him, "Where is my money? * * * You all done well, you all made a lot of money, what about me?" Reinfeld answered, "What do you want from me now that you threw all your money away? I haven't got your money." The petitioner insisted that Reinfeld give him $100,000 to pay his debts. There was an argument and Reinfeld said that the petitioner threatened him. Asked to tell about this in detail Reinfeld said, "Well, he had his hand in his pocket (indicating) and said that he would kill me if I did not give him the money in three days." Then, said Reinfeld, the petitioner "run out". Reinfeld stated that because of the incident he cancelled some appointment that he had and that he "was disgusted and discouraged with business and everything." (R. 40-42.)

A couple of weeks later the petitioner again came in to Reinfeld's office, pushed the latter's secretary

aside, and told Reinfeld "that if I don't give him that money that he is going to kill me." At that time the petitioner's demand went up to $150,000. Reinfeld was then asked, "What happened to you about this time, if anything?" He answered, "Well, I took sick." (R. 42-43.)

A week or two later the petitioner came to Reinfeld's New York hotel room and saw him there. Reinfeld said he did not remember what the petitioner said but that it was "nothing bad". As the petitioner was leaving, Reinfeld followed him to the door and then, Reinfeld states that Rutkin "opened the door and started to walk out. He turned around and put a gun on me" saying " 'you get well and get me that money' ". At that time his figure was $200,000. He said, "Get me $200,000 or I will kill you." Sometime later, no specific date being fixed, at a time when Reinfeld stated he was just getting well, the petitioner telephoned him, told him that he was sick and started to apologize. The petitioner sounded over the telephone as though he were crying. Reinfeld said that he felt bad about this and agreed to go to the petitioner's hotel to see him. He did go to the hotel. The petitioner told him that he had not slept since he had been up to see Reinfeld and that he must have been crazy or something. Reinfeld stated that he felt very sorry for the petitioner and said, "Let's forget the whole thing." The petitioner told him that he owed $4,000 for room rent and some other things and asked him for money. Reinfeld went

out, obtained $5,000 and brought it back to him. Then, stated Reinfeld, "he told me if I could only give him another $5,000, how much he will think of me and all that. So I gave him another $5,000 at about 5 or 6 o'clock that afternoon." (R. 43-44.)

Within a month, at the home of his brother-in-law, Reinfeld again saw the petitioner (R. 30). There the petitioner stated that he was going to kill Reinfeld and Reinfeld's family if he did not get his money (R. 51, 230-231).

Later the same day, when certain negotiations between Reinfeld and others had been completed, Kessler, an attorney who had arbitrated these other matters that day, asked Reinfeld, "How about Mr. Rutkin?" Reinfeld asked: "Well, what is his claim?" Kessler replied: "Well, you been friends, you slept with him for a long time; now go in in the other room and give him some money and get through with it". (R. 47, 223-224.) Reinfeld and the petitioner went into another room. The petitioner had first wanted half a million dollars and finally said he would take $250,000. Reinfeld agreed to pay this amount because "I wanted to get rid of him anyway and get this off my mind, because I carried it long enough. I was a sick man. So I agreed." (R. 47, 225-226; 994-995.)

Several weeks after the meetings just described but before the actual payment of the $250,000 here involved, the petitioner telephoned the office of the Jos. A. Reinfeld Company. Lou Holtz, Rein-

feld's brother-in-law, answered and recognized the petitioner's voice. The petitioner said something about the fact that Reinfeld was sick and that if anything happened to him he would hold Reinfeld's family responsible for the money which he claimed; that if he did not get it he would kill the whole family. (R. 231-232.)

$250,000 was actually paid over to the petitioner on May 11, 1943, in exchange for a general release from him in favor of Reinfeld, the latter's brothers, Browne Vintners Company, Inc., and others (R. 52-53, 269).

ARGUMENT

1. The petitioner's chief contention is that the $250,000 here involved did not constitute taxable income to him because, under the Government's theory of the case, the funds were extorted. However, the broad language of Section 22(a) of the Internal Revenue Code and the claim of right doctrine announced by this Court in *North American Oil* v. *Burnet*, 286 U. S. 417, and *United States* v. *Lewis* 340 U. S. 590, rehearing denied, 341 U. S. 923, are controlling, on the facts in this record, in favor of taxability. *Commissioner* v. *Wilcox*, 327 U. S. 404, is inapplicable.

The Government's evidence was that the $250,000 was illegally obtained by the petitioner. But illegality does not *per se* preclude taxability. The legislative history of Section 22(a) demonstrates that it was the intent of Congress to tax gains, profits, or income from any unlawful venture as

well as from any lawful business. Unlawful gains, except for the special category excluded by the *Wilcox* decision, have been taxed consistently. *E.g., Johnson* v. *United States*, 318 U. S. 189 (illegal gambling); *United States* v. *Sullivan*, 274 U. S. 259 (traffic in liquor); *Caldwell* v. *Commissioner*, 135 F. 2d 488 (C.A. 5th) (bribes); *Humphreys* v. *Commissioner*, 125 F. 2d 340 (C.A. 7th), certiorari denied, 317 U. S. 637 (ransom funds); *Barker* v. *Magruder*, 95 F. 2d 122 (C.A. D.C.) (usurious interest); *Chadick* v. *United States*, 77 F. 2d 961 (C.A. 5th), certiorari denied, 296 U. S. 609 (graft); *Chicago R. I. & P. Ry. Co.* v. *Commissioner*, 47 F. 2d 990 (C.A. 7th) (railroad overcharges); *Steinberg* v. *United States*, 14 F. 2d 564 (C.A. 2d) (illicit traffic in liquor); *Akers* v. *Scofield*, 167 F. 2d 718 (C.A. 5th), certiorari denied, 335 U. S. 823 (funds obtained under false pretenses); *Patterson* v. *Anderson*, 20 F. Supp. 799 (S.D.N.Y.) (unlawful insurance policies); *United States* v. *Wampler*, 5 F. Supp. 796 (D. Md.) (moneys of a client fraudulently misapplied by an attorney).

In the *Wilcox* case, this Court held only that "the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of § 22(a)." 327 U.S. at 408. The taxpayer in that case had obtained the money in question by embezzling it, not, as in this case, as a result of a bilateral agreement, however tainted with illegal-

ity, pursuant to which the payor intended to, and did, make payment. There was here no "bare receipt" of the $250,000 and, as the court below has emphasized (R. 997), the petitioner received the $250,000 with a "semblance of a *bona fide* claim of right", a conclusion fully substantiated by the testimony of both the petitioner and the Government witness Reinfeld. In addition, there was here no definite, unconditional obligation to repay or return the funds, as there was in *Wilcox*. As the court below put it (R. 997-998):

> * * * there is not the slightest hint in the record that Rutkin ever had or has such obligation. Reinfeld, after agreeing to giving the $250,000 to Rutkin, did cause that sum to be turned over to him and took from him a general release. Reinfeld, the owner of the funds, participated in what he designates as their misappropriation by his own conscious acts. Obviously, as a result of that transaction, Rutkin at that time possessed a colorable claim of title to the money. This has never since been challenged. Reinfeld has unmistakably considered the $250,000 to be Rutkin's property. He has left Rutkin in undisputed possession of it for the last eight years and has permitted the statute of limitations to expire on whatever right he might have had to reclaim the money.

To hold that this case thus differs from the *Wilcox* situation is not to turn one's back on the Government's theory of the case at trial or on

the jury verdict as guided by the instructions of the trial judge. (Pet. 9-10.) For between the petitioner's rejected contention, that he was in fact entitled to the $250,000 as his proper share of the business in which he had once had an interest, and a case of simple theft or robbery—securing of money from a stranger at gun point, for example—is a middle ground. That is what we have here: the assertion of a claim, baseless in fact, but pursued so insistently and threateningly as to result in a decision by the victim to negotiate a settlement. What the jury here decided was not that petitioner had no "claim" but rather that he had no "right".

2. The possible basic factual determinations in this case were carefully submitted to the jury by the trial court's instructions. It is apparent from a reading of the entire transcript that the Government's contention with respect to the $250,000 was that it was extorted from the witness Reinfeld, even though the petitioner's threats were accompanied by assertions of a right to the funds. The petitioner's contention was that he had received the $250,000 by virtue of his interest in Browne Vintners and that the tax upon that amount had already been paid. The trial court instructed the jury that (R. 930):

> If that money was extorted and was paid as a result of threats, then it was taxable income and Rutkin was under the duty of reporting that tax.

This instruction permitted a conviction if the jury accepted the Government's testimony. The trial court further charged (R. 930, 932, 1000):

> Rutkin says that that $250,000 was a final settlement of his claim in Browne Vintners, and if that is so—and the Government does not contend that the capital gains tax was not paid—he would not be obliged to report that income. * * * If he got it properly the tax was already paid.

This instruction permitted an acquittal if the jury accepted the petitioner's testimony. Despite the clarity of the issues involved and the appropriate instructions given, the petitioner nevertheless complains that prejudicial error resulted from the trial court's refusal to give the following requested charge No. 29 (R. 999):

> 29. It is admitted that the capital gains tax on the sale of all of the Browne Vintners stock was paid, and, therefore, if the money which Rutkin received came to him as a result of his interest in Browne Vintners stock, it was not taxable, he was under no obligation to report it in his income tax return for 1943, and he must be acquitted. Even if you believe Rutkin made threats to Reinfeld and that these threats produced the money, if the money was in payment of Rutkin's interest in the Browne Vintners stock, he should be acquitted.

It is apparent, however, as stated by the court below, that the requested charge injected into the

case "a new issue * * * one which was never tried under the indictment * * * *" (R. 1001), and that it was therefore properly refused.

Moreover, as instructed by the trial judge in the last-quoted portion of his charge, the jury could not have convicted petitioner if, in the language of petitioner's requested charge No. 29, "the money was in payment of Rutkin's interest in the Browne Vintners stock". Thus the failure to charge that acquittal should follow if this were the case, even though petitioner's threats also produced the money, could hardly have been prejudicial error, if it was error at all.

CONCLUSION

The judgment of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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